No. 21362

In the

United States Court of Appeals

For the Ninth Circuit

EXBER, INC., d/b/a El Cortez Hotel,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petitioner's Opening Brief

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TOPICAL INDEX

STATEMENT OF THE CASE

On April 21, 1965, the Board issued an unfair labor practice Complaint against Petitioner, a Nevada Corporation, operating a hotel, restaurant and gaming casino alleging violations of Section 8 (a) (1) and (3) of the Act. (R. Vol. I, p. 6) This Complaint was issued upon an unfair labor practice charge filed on June 29, 1964, by the American Federation of Casino and Gaming Employees (hereinafter referred to as Union). Said charge merely alleged that the Petitioner unlawfully discharged William Cox. (R. Vol. I, p. 3)

Thereafter on October 19, 1964, the Union filed a first amended charge alleging that Louis Cantalamessa and Robert Jones were unlawfully discharged on June 28, 1964. (R. Vol. I, p. 4)

Four months after the Complaint had issued on July 7, 1965, the Union filed a second amended charge, which was in fact a substitute charge re-alleging its previous allegations and further alleging that David Conner and David Waggoner were discriminatorily discharged on June 28, 1964, almost one year prior thereto. (R. Vol. I, p. 8)

On July 28, 1965, the Complaint was amended to add the names of Conner and Waggoner as alleged discriminatees. (R. Vol. I, p. 26)

A hearing was held in Las Vegas, Nevada, on August 10, 11, 12, and 13, 1966, before Trial Examiner Maurice S. Bush, who just the week prior thereto had heard a similar type case in Las Vegas, Nevada, involving Hotel Conquistador, Inc. d/b/a Hotel Tropicana and the Union.[1]

At the hearing Petitioner moved to dismiss the amendment to the Complaint alleging the unlawful terminations of Conner and Waggoner on the basis that it was time

1. 159 NLRB No. 105.

barred under the provisions of Section 10 (b) of the Act. (R. Vol. II, p. 36) In addition, evidence was submitted that William Cox was terminated because of an admitted vile and profane utterance to his immediate Supervisor in the presence of other employees and customers. (R. Vol. II, p. 433)

Petitioner adduced substantial evidence all of which was unrebutted, that as a result of economic conditions a second crap table was reduced from a seven day a week operation to a weekend only operation. This situation resulted in personnel overstaffing, and thus the supervisors and managing shareholders of the Petitioner met and jointly selected persons for termination. (R. Vol. II, pp. 536-538)

Uncontradicted evidence was introduced that Louis Cantalamessa was selected for termination over the objection of his friend, Supervisor Paravia because there had been several reported instances where Cantalamessa's integrity had been questioned. In addition, it had been noted that Cantalamessa had presented himself for work one day, with an ice pick in his shoe and further, had recently become involved in a personal feud with Supervisor Faccinto. (R. Vol. II, pp. 539 & 540)

David Waggoner was selected for termination because he had begun to inbibe and as a result thereof admittedly on many occasions failed to report for work. (R. Vol. II, p. 544)

Robert Jones, who failed to appear at the hearing and rebut any evidence, was terminated because his ability to perform dual functions was limited. (R. Vol. II, p. 545)

David Conner, who like Jones failed to appear at the hearing, was a new employee, but in the short time he was employed demonstrated an inability to perform his work properly. (R. Vol. II, p. 545)

In addition to Jones, Conner, Cantalamessa and Waggoner, Harry Mills, also a dealer, was terminated, even though his seniority was greater than any other employee, but it was not alleged that he was unlawfully terminated.

In addition to the evidence regarding the terminations of the above named persons, evidence was introduced regarding conversations between supervisors and some employees which were alleged to be in violation of Section 8 (a) (1) of the Act.

The Trial Examiner, as he had done in Hotel Conquistador d/b/a Hotel Tropicana case, *supra,* concluded that not one witness presented by Petitioner was credible. He further concluded that the substitute charge, hence the amendment to the Complaint, was timely despite Section 10 (b) of the Act. Also, he found that William Cox was not terminated because of his admitted vile and lewd remark to his Supervisor, but because of his Union affiliations which purportedly became known to Petitioner during a conversation several weeks before his termination with another Supervisor.

With respect to the terminations of Jones, Conner, Cantalamessa and Waggoner, he ruled that the closing of Crap Table No. 2 was merely a pretext and that the terminations of these individuals, even though Jones and Conner failed to appear at the hearing, was motivated by anti-union considerations, not because of any affirmative evidence rather because Mr. Dobson, was unbelievable. He also stated that even if the closing of the crap table were economically justified there could not have been an overstaffing of personnel and these men were unlawfully terminated.

The instant Petitioner for Review is directed towards the Board's affirmation of the Trial Examiner's decision.

SPECIFICATION OF ERROR

(1) The Board's Order which dismisses Petitioner's Motion to Dismiss that portion of the Board's Amended Complaint, alleging the unlawful termination of David Conner and David Waggoner, notwithstanding that the unfair labor practice charges supporting said allegations were not filed until one year after their terminations is contrary to law, as specifically provided at Section 10 (b) of the Act.

(2) The bias and hostility of the Trial Examiner deprived Petitioner of due process of law.

(3) The Board and Trial Examiner erred in finding that Petitioner engaged in certain unfair labor practices in violation of Section 8 (a) (3) and (1) of the Act by discriminating with respect to the tenure of employment of William Cox, despite his vile, lewd and obscene remarks to his supervisor because said finding is based on misstatements of fact, a failure to credit uncontroverted testimony, and on inferences unsupported by the evidence.

(4) The Board and the Trial Examiner erred in finding that Petitioner violated Section 8 (a) (3) and (1) of the Act by discriminating in regard to the tenure of employment of David Conner and Robert Jones because neither of said persons appeared at the Board's hearing and therefore said finding is based merely on allegations without proof and further that said finding disregards Petitioner's unrebutted, uncontroverted evidence.

(5) The Board and Trial Examiner erred in finding that Petitioner engaged in certain unfair labor practices in violation of Section 8 (a) (3) and (1) of the Act by discriminating with respect to the tenure of employment of Robert Jones, David Conner, Louis Cantalamessa and David Waggoner because there is no evidence in the record to indicate

or support any finding that said persons were terminated for any reasons prohibited by law and further said findings were in complete and total disregard of the unrebutted, uncontroverted evidence of Petitioner.

(6) The Board and Trial Examiner erred in finding that its Supervisor Albert Faccinto unlawfully interrogated employees concerning their Union activities within the meaning of Section 8 (a) (1) of the Act because the testimony in support of said allegation was inherently incredible and contrary to the clear preponderance of the evidence.

(7) The Board and Trial Examiner erred in finding that Petitioner violated Section 8 (a) (1) of the Act when it found that Supervisor Paravia unlawfully interrogated employees Waggoner and Alcini because testimony in support of said finding is inherently incredible and contrary to the preponderance of the evidence.

(8) The Board and the Trial Examiner erred in finding that Petitioner violated Section 8 (a) (1) of the Act when it found that Supervisor Thomas Musso unlawfully interrogated an employee concerning his Union activity, threatened an employee with economic discharge or economic reprisals because of his Union activity and gave the impression that employees' Union activities were under surveillance because the testimony in support of said findings is inherently incredible based on non-existent conversation and contrary to the clear preponderance of the evidence.

I. The Amendment to the Complaint Adding Conner and Waggoner as Alleged Discriminatees Was Time Barred Under Section 10 (b) of the Act.

As heretofore pointed out, on July 7, 1965, the Union filed a second amended charge which in fact was a new and substituting unfair labor practice charge alleging that David

Conner and David Waggoner were discriminatorily discharged on June 28, 1964.

Thereafter, the Board moved to amend the Complaint and added Conner and Waggoner as alleged discriminatees.

Petitioner has continuously urged that in view of the late filing of the unfair labor practice charge relating to Conner and Waggoner approximately one year after their terminations, the amendment to the Complaint clearly and flagrantly ignores the mandate of Section 10 (b) of the Act. (29 U.S.C.A. § 160 [b]) The six month statutory limitation on the Board has been ignored. *Local Lodge 1424 IAM v. NLRB,* 362 U.S. 411.

The second amended charge filed by the Union on July 7, 1965, was in fact a substitute charge alleging new unfair labor practices, to-wit: the unlawful discharges of Conner and Waggoner. Accordingly, the second amendment to the Complaint should have been dismissed. *NLRB v. Vare,* 206 F.2d 543.

II. The Board's Order Which Adopted the Decision of the Trial Examiner Reveals on Its Face the Hostility of the Examiner Towards the Legal Gaming Industry of Nevada and This Hositility Has Deprived Petitioner of Its Right to Due Process of Law.

One week immediately preceding the formal hearing the instant cause, the Trial Examiner heard and subsequently decided a similar type case involving another Las Vegas resort hotel and casino. (R. Vol. I, p. 4) In his decision therein, not a single Employer witness was found to be credible no matter what the testimony.

In the instant case, he has again found that not one single Employer witness to be truthful despite corroboration and exhibits.

History reveals that it is not uncommon for Trial Examiners of the National Labor Relations Board to make blanket resolutions of credibility. Rarely, however, are such resolutions based on the obvious bias and vindictiveness which we urge exists here. The bias and prejudice demonstrated by the instant Trial Examiner, which even he did not try to conceal, is not only directed at Petitioner, but at the entire legal Nevada gaming industry.

The most dramatic exhibition of the Trial Examiner's hostility and prejudice was his statement:

> "The evidence as heretofore noted, shows that the gambling industry in the Las Vegas region is a close knit fraternity and accordingly, fear of repercussions on his job opportunities may be responsible for Conner's absence at the time Government Counsel was ready to call him as a witness." (R. Vol. I, p. 23)

Where in this entire record is there any evidence to support this gratuitous, uncalled for and prejudicial conclusion?

The Trial Examiner was obviously unable to restrain his feelings when it came to the written word and thus these feelings cast grave doubt on his objectivity in assessing the entire case. A hearing conducted by a biased or prejudiced officer of an administrative tribunal is a denial of constitutional due process of law and nullifies the proceedings before the agency. This rule is supported by the many cases cited in *National Labor Relations Board v. Phelps,* 136 F.2d 562, 563 and well described in the following quotation from that case:

> ". . . for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceedings by an administrative functionary as when it is done by a judge. Indeed, if there is any

> difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for *when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceedings.* Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand."

In the case just cited recourse was had to the transcript to demonstrate the hostility of the hearing officer. In this case, that is not necessary; it is necessary only to read his decision. No unbiased person could have written the invective it contains. No unbiased Trial Examiner could have found that the failure of General Counsel's witness to appear was because of his fear of "repercussions" while he found that one of Respondent's witness failure to appear was because he could not corroborate other testimony. No unbiased Trial Examiner could have found all Employer witnesses in two separate cases involving the Nevada gaming casinos to be totally incredible. No unbiased Trial Examiner could have found two persons discriminatorily discharged when neither of them appeared at the hearing. And certainly no unbiased Trial Examiner could have reached some of the nonsensical conclusions as he did as will be more fully described hereafter.

Bias and prejudice by the Trier of Facts has reared its ugly head and has vitiated the whole proceedings. In fact, because of his patent bias, prejudice and hostility towards the Employer and the industry involved in the subject proceedings, the Trial Examiner should have properly and ethically disqualified himself before the trial commenced. To have done otherwise was a disservice to the parties litigant and to the agency he represents.

III. William Cox Was Terminated for Using Repulsive, Vulgar and Obscene Language Towards His Supervisor and for No Other Reason.

William Cox was terminated for cause on June 22, 1964, by Joe Chiarra, his supervisor, for using indecent, profane, vulgar and obscene language towards Chiarra during the course of his employment. The remark, the height of vulgarity, was admittedly made by Cox, overheard by employee Wesley Kabush and made in the presence of customers. As a matter of fact Cox boasted to his former roommate and good friend, employee Al Belson, of having made such a remark. (R. Vol. II, p. 153)

Wesley Kabush, an employee of the El Cortez, who has no direct interest in the outcome of this case, clearly described the incident. In addition to explaining what Cox had admittedly said, he testified that at the end of the work shift, on June 22, 1964, Chiarra told Cox: "You don't know it, but you are through. Don't come back in the morning." To which Cox replied: "You don't have the authority to fire me." Chiarra then answered that Mr. Musso had given him the authority to terminate anyone who acted improperly. (R. Vol. II, p. 434)

It has been proven that immediately at the end of the shift on which Cox was terminated, Chiarra advised his supervisor, Mr. Musso, of Cox's reply to the termination,

to-wit: You don't have the authority to fire me. In obvious response thereto, Musso sought to telephone Cox and confirm Chiarra's action, but upon calling his last known residence, Musso was advised by Cox's former roommate, Al Belson, that Cox had moved out. (R. Vol. II, pp. 121, 434, 463, 464)

Cox and Belson pictured Cox as a cocky, intemperate individual who prided himself on antagonizing his supervisors, particularly Joe Chiarra. (R. Vol. II, pp. 124, 231) Belson described Cox as having "quirks" and Cox himself admitted that he reveled in aggravating the 68 year old Chiarra. Cox's demeanor on the witness stand, as well as his wife's characterization of him as being a "big-mouth" leaves no doubt that Belson's analysis is correct. (R. Vol. II, p. 412)

Cox first began harassing Chiarra after the latter replaced Belson as the Boxman. (R. Vol. II, pp. 102, 429) The general feeling among the crew was that Chiarra was incompetent, but only Cox is reported to have displayed patent antagonism. Cox believed that harassment, confusion and name-calling was the order of the day. Such conduct he admits. (R. Vol. II, pp. 124, 232, 412, 430)

Mr. Musso testified that on complaints from Chiarra he called the dealers together on at least three occasions to advise them that the Employer demanded that petty jealousies not interfere with the operation of the table. (R. Vol. II, p. 432) Wesley Kabush and Cox have verified the occurrence of meetings. (R. Vol. II, p. 225) Musso further testified that he did not know who Chiarra was complaining about, (R. Vol. II, pp. 468, 469) same evidenced by the fact that the admonitions to the dealers were couched in general terms and not directed at any one individual. (R. Vol. II, p. 432)

In view of Cox's conduct, an unbiased Trial Examiner would have concluded that Kabush's unrebutted testimony was ample proof of the facts. However, this Trial Examiner avoids the obvious and with mystical power suggests that it was Musso and not Chiarra who terminated Cox. Musso, he found, knew of Cox's Union affiliation and if Chiarra had testified he could not have corroborated Kabush.

At this juncture, let us note that the Trial Examiner gives an onerous connotation to Chiarra's failure to testify. However, later in his decision he finds that the General Counsel's failure to produce Jones and Conner is excusable. The Trial Examiner knew full well that Chiarra's testimony would have been cumulative. However, a logical and realistic finding such as that would have deodorized the atmosphere of prejudice created by the Trial Examiner.

Wesley Kabush was the sole witness in this entire case who had no interest in its outcome. His testimony is critical and should not have been ignored.

It is undisputed that the discharge of an employee for wrongful conduct is an inherent power of management and one that is protected by law. *Shell Oil Co. v. NLRB,* 196 F.2d 637. The Act does not condone conduct which is disruptive between Employer and employee relationships. *Caterpillar Tractor Co. v. NLRB,* 230 F.2d 357. If an employee provides his employer with cause for discharge, the Board cannot save him from the consequences of his action by showing the employee was pro-Union or that the Employer may be anti-union, which certainly is not the case herein. If an employee is insubordinate and also engaged in Union activities, it does not destroy the just cause for discharge. *NLRB v. Birmingham Publishing Co.,* 262 F.2d 2. (See also: *NLRB v. Soft Water Laundry,* 346 F.2d 930; *NLRB v. Bluebell, Inc.,* 219 F.2d 796; *Gulf Coast Transit Co. v. NLRB,*

No. 332 F.2d 28; *Farmer's Co-op Co. v. NLRB,* 208 F.2d 296; *NLRB v. Longview Furniture Co.,* 206 F.2d 274; *NLRB v. Polynesian Arts,* 209 F.2d 846.

IV. The Board's Finding That David Conner and Robert Jones Were Discriminatorily Terminated Is Without Evidentiary Support Particularly in View of Their Failure to Appear at the Hearing.

The Board's finding that David Conner and Robert Jones were discriminatorily discharged under the circumstances of this case represents a classical innovation in the law.

Neither Jones or Conner appeared at the hearing, despite several months' notice. Thus, there exists nothing in the record to rebut Mr. Dobson's explanation of why they were terminated.

In his decision, the Trial Examiner ruled Dobson to be incredible despite his uncontroverted testimony with respect to these two persons. Notwithstanding, the Trial Examiner apparently "feels" that because he does not believe Petitioner's witness, a mere allegation in the Complaint is evidence of discrimination and thus the unlawful act of Petitioner is inferred.

Not only is the Board and Trial Examiner in error for ignoring Dobson's sworn uncontroverted testimony, *NLRB v. Atlanta Coca Cola Bottling,* 293 F.2d 320, but in the final analysis, they find Jones and Conner to have been unlawfully terminated because of the allegation in the Complaint. They have totally ignored that mandate of the Supreme Court as set forth in *Universal Camera Corp. v. NLRB,* 340 U.S. 474. Mere allegations do not constitute evidence.

This record is totally devoid of any evidence to support a conclusion that Jones and Conner were terminated for Union activities.

V. The Board's Findings That Jones, Conner, Cantalamessa and Waggoner Were Unlawfully Terminated Are Not Supported by Substantial Evidence on the Record Considered as a Whole.

In essence, the Board and Trial Examiner have concluded that Jones, Conner, Waggoner and Cantalamessa were unlawfully terminated, not because the reasons advanced for termination were untrue, but rather, because the testimony of Petitioner's General Manager, Dobson, which explained why the supervisors met to select persons for termination, is not to be believed, and thus it must have been for Union activity.

We respectfully suggest that a review of the facts is essential and will conclusively demonstrate the error of the Board, the bias of the Trial Examiner and the lack of substantial evidence supporting the Board's Order.

In 1962, Exber, Inc., purchased the El Cortez Hotel and Casino. From the time it first commenced operations to June 1, 1964, only Crap Table No. 1 was in operation on a full seven day a week basis with Crap Table No. 2 operating only on weekends. (R. Vol. II, pp. 513, 514)

In May, 1964, Mr. John D. Gaughan, President of the Employer and Mr. Dobson noted that the volume of business on Table No. 1 (also referred to as "drop") warranted the expansion of the hours of operation of Table No. 2 to a seven day a week schedule from 3:00 P. M. to 11:00 P. M. daily. (R. Vol. II, pp. 518, 519)

On or about June 4, 1964, the new schedule for Table No. 2 was placed into effect only on an experimental basis. However, after the second week of operation, Mr. Dobson noted that the "drop" was insufficient to not only provide a profit, but it did not even cover the costs of operating the table. As he testified since the table was averaging a daily drop of only $1,000.00 and since the anticipated gross profit to the Employer would be only $190.00 per day, the

earnings were insufficient to cover direct labor costs, state taxes and other overhead items. (R. Vol. II, pp. 517-522) He said:

> "(Dobson) The average labor expense, which would apply to craps, too, would be the cost of four dealers at approximate wage of $20, which is a total of $80. There is a box man who is in charge of the game that received a salary of approximately $35 * * *" (R. Vol. II, pp. 14-18)
>
> "The average box man's wage is about $35. The wages between the five men alone were $115. In our particular case with craps, too, where you had a second game, we had to hire a third man to give the breaks to the two box men, which was an additional expense."
>
> "The other expenses of operation, if you are winning less than you anticipate, the State taxes you regardless of what your expense is. Their taxation is based on your gross and that is a sliding scale that begins at three per cent, and in addition you have other expenses for paraphernalia if the game is open and even operating below your expense volume you will still have customers that you buy drinks for and cigarettes, and you could total the expenses of this game and ascertain that it would not make us any money. It would be a very simple computation at $190." (R. Vol. II, pp. 518, 519)

In addition, the records reflect that in May, 1964, when Table No. 2 was in operation on weekends only, the drop was $36,620. and in June, on a full week schedule, the drop was only $35,625. (R. Vol. II, pp. 521-522)

In view of the fact that Table No. 1 was unprofitable, in the third week of June, 1964, Mr. Gaughan and Mr. Dobson determined that Table No. 2 should be returned to the original weekend only schedule. (R. Vol. II, pp. 517-522) Alfred Belson also recalled that business had slackened at this time. (R. Vol. II, p. 115)

At this juncture it is to be noted that the month of July is normally the busiest month of the year for gambling casinos in Las Vegas and it would be totally unbelievable to assume that any gambling casino would close down a crap table during this month and operate it on a limited basis merely as a pretext for anti-union conduct. (R. Vol. II, p. 116)

As stated above, the reduction in the hours of operation on Table No. 2 which was to occur the week ending June 28th left the Employer with an oversupply of dealers and, in addition, brought to light the fact that the overhead was in excess of what it should normally be. (R. Vol. II, p. 523) Accordingly, Mr. Dobson and Mr. Gaughan called a meeting in the third week of June, 1964, for the purpose of adopting cost saving devices which included reducing the number of dealers. (R. Vol. II, pp. 536-537) Present at this meeting were not only Mr. Gaughan and Mr. Dobson, but Messrs. Musso, Faccinto and Paravia who were the shift bosses. At this two hour meeting, the purpose of which was to reduce the number of employees and retain the most capable, it was decided that five dealers would be terminated. (R. Vol. II, pp. 536, 538) The ultimate decision, of course, was made by Messrs. Gaughan and Dobson.

Among those selected for termination was Harry Mills, a "21" dealer, who, though he had worked for Mr. Gaughan for a number of years, came to be known as a trouble maker.

Louis Cantalamessa was selected for termination over the objection of his life-long friend, Mr. Paravia, because, as Mr. Dobson had explained, there were several reported incidents wherein Cantalamessa's integrity was questioned. (R. Vol. II, pp. 539, 540) In addition, it was brought to light that Cantalamessa had once come to work with an ice pick in his shoe and also had become involved in a personal feud with Mr. Faccinto. (R. Vol. II, pp. 542-547)

Significantly, Cantalamessa did not resume the witness stand to deny the existence of the foregoing facts.

David Waggoner was selected for termination because he was regarded as being undependable and in gambler's parlance a "washout." (R. Vol. II, p. 544) Mr. Waggoner had a habit of consuming too much alcohol on pay-days and as a general practice failed to appear for work the following day. (R. Vol. II, p. 544) It should be noted that Waggoner admitted that on many occasions he failed to report for work, but offered the excuse of being ill. (R. Vol. II, p. 325)

Robert Jones, who failed to appear at the hearing, was selected for termination because he was the most recent $22.50 per day dealer who dealt only one game. (R. Vol. II, p. 545)

David Conner, who like Jones, failed to appear at the hearing, even though subpoened by the General Counsel, was selected for termination because as a break-in dealer, earning less than $22.50 per day, he demonstrated an inability to perform his work properly. (R. Vol. II, p. 545)

Mr. Dobson explained that when the table was returned to the weekend schedule on June 28, 1964, the above named employees were notified of their termination.

In view of Dobson's testimony, all of which stood uncontroverted in every respect, the Trial Examiner suggests that Dobson was incredible because of a subsequent reinstatement in August, 1965, of Crap Table No. 2 to the full week schedule. He totally ignores the fact that a contest was implemented, the bet limit was reduced, and, most important, break-in dealers were used; thus creating a lower overhead.

Dobson said:

> "A. The policy for hiring dealers at the El Cortez is based upon breaking dealers in. The cost of operat-

ing a crap table or 21 table is identical everywhere in the city for each casino, regardless of the volume they do. Assuming that all the conditions are the same, which they are, it costs us just as much to operate a crap table as it does at the Fremont Hotel or the Mint. The only variance that would appear would be the wage structure. Otherwise, the cost of operating the table, obtaining the licenses from the State of Nevada and Clark County and the City of Las Vegas, are identical to that of the Fremont Hotel, the Mint, the Golden Nugget, any other operation. They only variance deviating from the cost of operation would be on the wage structure, and, obviously, the El Cortez operation isn't nearly as large as one of the larger ones, and, therefore, we adopt the policy of breaking in dealers who come to us and want to break in, and in exchange they work at a lower rate of pay, thereby providing them a way to learn a new trade and also permitting us to operate at a lower overhead.

Also we choose to break in dealers because it is not as expensive as if you were to break in a dealer at the Desert Inn, which is a large operation on the Strip. A game of that type where they have a high volume and you took a person to break him in on such a game, it would be very expensive.

In an operation of our size, which is a great deal smaller and is probably one of the smallest operations on Fremont Street, we can afford to break them in, because we do have a lower minimum. With this lower minimum, there isn't as much volume, and we take dealers and permit them to learn. Any mistakes they do while they learn the process isn't too costly, as it would be on the Strip. Therefore, that is the second reason for breaking in dealers, and at all times it has been Mr. Gaughan's stern policy to always have break-ins.

It has its disadvantages because it results in overstaffing, and therefore the shift bosses are in a position where they try to guess or gauge upon what might happen. The dealers don't show up or they get sick,

and we utilize these break-ins in many, many ways. Our main reason is in labor saving and at all times Mr. Gaughan says we will have them."

The Trial Examiner also suggests that Petitioner's failure to hire additional dealers when the table was restored to a seven day schedule in August, 1965, was further evidence of Petitioner's unlawful motivation. This novel assertion ignores Dobson's uncontroverted evidence that in late June, when Table No. 2 was reverted to weekends only, the overstaffing problem that had apparently existed became glaring.

As we have pointed out above, the positive testimony presented by Petitioner clearly proves that the decision to restore Crap Table No. 2 to a weekend only schedule was economically justified. In the face of such positive, uncontroverted evidence, the Board and Trial Examiner reach an unexplainable decision.

A careful consideration of the record will demonstrate the Board failed to meet its burden of proving the terminations of Jones, Conner, Waggoner and Catalamessa to be unlawful. *Universal Camera Corp. v. NLRB,* supra. There is nothing in the record to detract from Dobson's testimony. Whim of a Trial Examiner is even less of a reason.

VI. The Board's Finding That Supervisor Faccinto Unlawfully Interrogated Louis Cantalamessa Is Unsupported by Any Credible Evidence.

Louis Cantalamessa testified that on May 16, 1964, Supervisor Faccinto told him that he, Robert Jones, Peewee Alcini, and Faccinto's nephew should stay out of the Culinary Union until they saw what they were doing up at the Golden Nugget. He also testified that on June 23, 1964,

Faccinto again approached him and asked if he had joined the Union.

The Trial Examiner and Board credited Cantalamessa's testimony without regard to the facts that:

(a) Faccinto testified that he had no nephew or for that matter a nephew working at the El Cortez Hotel. (R. Vol. II, p. 457)

(b) Alcini did not testify as to any conversation about a Union so why would have Faccinto told Cantalamessa that he and Alcini and the *non-existent nephew* were to stay out of the Culinary Union. (R. Vol. II, pp. 144-148)

(c) On direct examination, Cantalamessa said that Faccinto mentioned the Culinary Union and that there was something about the Union being organized. (R. Vol. II, pp. 281, 289) On cross examination, Cantalamessa changed the date of the conversation and refused to state whether or not there was reference to the Culinary Union and added that he asked Faccinto if it would hurt him personally and that Faccinto said it would not. (R. Vol. II, p. 301)

(d) Cantalamessa admitted inconsistencies between the statement given to the Board Agent in his pre-trial affidavit and his testimony at the hearing.

(e) Cantalamessa admits to knowing Faccinto for twenty years and having talked to Faccinto every day on every subject imaginable, yet was able to recall only two conversations with Faccinto.

The foregoing item is really the key to Cantalamessa's incredibility. It was admitted by Cantalamessa that the Steubenville, Ohio group, including Faccinto, Cantalamessa, Paravia, Jones and Alcini, whose friendships date back to early childhood, socialized together on a daily basis. Their conversations touched upon every subject, including the Union. However, when Cantalamessa is able to come forward and testify with avowed specificity on direct exami-

nation, though contrary on cross examination, to comments of Faccinto's both of which total not over 50 words, it is totally and absolutely incredible. The Board and Trial Examiner have erred.

VII. The Board's Finding That Supervisor Paravia Unlawfully interrogated David Waggoner Is Unsupported by any Credible Evidence.

David Waggoner testified that on June 25th or 26th, 1964, he was speaking to Union Business Agent Truman Scott and was asked by Supervisor Paravia if he was in the Union, to which Waggoner replied: "If I was going to steal, I don't put it on the microphone." Paravia denied this conversation with Waggoner.

Since the testimony of the two is in direct conflict, why wasn't Union organizer Truman Scott called to the witness stand to corroborate Waggoner's testimony? We respectfully suggest that in view of Scott's failure to assume the witness stand, it must be presumed that his testimony, if adduced, would not have been favorable to Waggoner. *Interstate Circuit v. U.S.,* 306 U.S. 208.

VIII. The Board's Finding That Thomas Musso Unlawfully Interrogated William Cox Is Unsupported by any Credible Evidence.

As heretofore stated, a basis of the Trial Examiner's finding regarding the termination of William Cox was that Thomas Musso and not Joe Chiarra terminated Cox.

As support for that portion of his decision, the Trial Examiner has used an alleged incident occurring on June 18, 1964, between Cox and Musso as controlling when considering Cox's termination. The error is clear in this respect because this alleged incident was resolved by a credibility determination made in favor of Cox against Musso. However, the Trial Examiner's version of this

alleged incident is completely erroneous and contrary to law. He gives credence to General Counsel's witnesses, whose testimony is inconsistent, garbled, replete with inaccuracies, contradictory and at some points physically impossible.

The incident referred to is purportedly one occurring on June 18, 1966. The Trial Examiner in believing all of General Counsel's witnesses concluded that in that conversation Thomas Musso violated Section 8(a)(1) of the Act by interrogating Alfred Belson and William Cox, and thus provides him with a reason to find Cox's termination to be unlawful.

General Counsel's witness, Alfred Belson, testified that on the morning of June 18, 1964, a Thursday, he was sitting in the coffee shop of the El Cortez Hotel with Mr. Cox and another dealer when Mr. Musso, the Pit Boss, walked in and inquired of both Cox and Belson as to whether or not they had joined the Union. (No reason was given as to why the inquiry was not made of the third dealer). Belson testified that he answered: "No." and that Cox replied: "It wouldn't be such a bad idea." Cox, of course, did not testify as to ever making such a remark. (R. Vol. II, p. 190)

Immediately thereafter, Belson said that he looked at his watch and left the restaurant after he saw which way the conversation was going. (R. Vol. II, p. 107) Cox testified that Supervisor Anderson came in and advised Belson to return to the Pit. (R. Vol. II, p. 191)

Belson also testified that at the crap table together with Noonan, Franklin and Domino, at around 7:00 A. M. or 7:30 A. M. Musso walked up, took some money out of his pocket and said: "I will bet this to a penny, Billy Cox is a union organizer for this Union." (R. Vol. II, p. 108) Belson later

characterized the amount of money as being a "roll". (R. Vol. II, p. 610)

Belson further stated that at the time of the alleged occurrence he was unable to recall whether or not Cox was still living with him or not. (R. Vol. II, p. 120)

General Counsel's witness, Holmes Franklin, testified that between 7:30 and 3:15 A. M. while standing at the table with Noonan, Kabush and Belson, Musso walked up and said: "I will bet this to a penny that Billy Cox is a Union Representative." Franklin then testified that he saw Cox walk from the restaurant whereupon Musso picked up his money and walked away. He further stated that his regular day off was always Tuesday. (R. Vol. II, pp. 134-136)

General Counsel's witness, Frank Noonan, testified that he was the Boxman on June 18th and as such set in the Pit, facing directly South, towards the entrance to the restaurant. He further stated that Franklin was the stickman, standing directly opposite to him, facing the North end of the Casino and that Kabush was also at the table. He testified that around 7:00 A. M. Musso walked up to the table and said: "I will bet all of this that Cox is the instigator of this Union activity." He said that he then saw Cox walk from the restaurant whereupon Musso gathered his money and walked away. (R. Vol. II, p. 169)

William Cox testified that on June 18, 1964, at around 7:00 A. M. as he was beginning his 20 minute break, he, Belson, and Domino were in the coffee shop when Musso approached and asked him if he and Belson had joined the Union. Cox said that Belson, Franklin and Domino were working that day and that Wesley Kabush was on his day off. (R. Vol. II, pp. 189, 190)

According to Cox, immediately after Musso made this remark, Harold Anderson, Musso's assistant, entered the

restaurant and called Belson back to the crap table since it was time to reopen. (R. Vol. II, p. 191)

Cox then testified as to a general conversation between he and Musso about the Union in which he alleges Musso made anti-Union characterizations, *but at no time inquired of Cox's sympathies.* At this juncture, it must be noted that there is no evidence that Musso knew of any organizational drive at the El Cortez Hotel. Cox stated that at the conclusion of the conversation he and Musso walked out of the coffee shop together and walked into the pit and from there Cox said he went to the rest room, returned shortly thereafter and saw Musso at the table picking up money and walking away. (R. Vol. II, p. 189)

Now let us review the substantial inconsistencies and the contradictions between the stories given by all four of the above named persons relating to the alleged incident of June 18th as well as other factors bearing upon their credibility.

(1) Belson testified that Noonan, Domino and Franklin were present. Franklin testified that Noonan, Kabush and Belson were present. Noonan testified that Kabush and Franklin were present. Cox testified that Noonan, Franklin and Domino were present. **Kabush testified that he was off Thursday, June 18, 1964.** (R. Vol. II, p. 428)

(2) Franklin testified that Musso walked up to the table to make his fictitious wager between 7:30 and 3:15 A. M. Noonan testified that Musso walked up to the table and made his alleged wager around 7:00 A. M. Cox testified that at 7:00 A. M. he, Belson, and Musso were in the restaurant together and that at the time he was beginning his twenty minute break. (R. Vol. II, p. 191)

(3) Belson testified Musso walked up to the table when he made the alleged wager. Franklin testified that he saw

Musso walk alone from the restaurant directly to the table. Noonan testified that he saw Musso walk alone from the restaurant to the table and that he picked up his money after this alleged wager when Cox walked out of the restaurant. *Cox testified that he walked out of the restaurant and into the pit with Musso.* (R. Vol. II, p. 194)

(4) Franklin testified that he saw Cox walk from the restaurant in his position of a stickman, which necessarily faced the North end of the casino. Noonan testified that as a Boxman, he saw opposite the stickman facing South towards the restaurant and that he saw Cox walk out of the restaurant (it is a physical impossibility for both to have seen Cox walk from the restaurant.)

(5) Belson, Franklin and Noonan gave different versions of what Musso is alleged to have said.

(6) Noonan gave a written statement to the Board Agent on October 23, 1964, at which time he could not recall the time of this alleged occurrence. Yet, during the hearing, over one year later, he is not only able to recall the date of this incident, but the precise time. (R. Vol. II, p. 177)

(7) Belson testified that he could not recollect if Cox was still living with him in June, 1964. Cox testified that he had moved out of Belson's home nine months prior thereto. (R. Vol. II, p. 230) (How can anyone not know who shared his home and when?)

(8) Belson testified that he left Musso and Cox in the restaurant immediately after Musso made his alleged inquiries after having looked at his watch and seeing which way the conversation was going. Cox testified that Harold Anderson entered the restaurant and called Belson to the crap table. (R. Vol. II, p. 191)

(9) Belson first testified that Musso laid some money on the table when placing this fictitious wager, but later en-

larged his testimony and stated that Musso laid a "roll of money" on the table. (R. Vol. II, p. 610) It should be noted that no one, except Belson, characterized the amount of money as being a "roll."

(10) Holmes Franklin testified that he was off on Tuesdays. Cox and Kabush testified that Holmes Franklin was always off on Mondays. (R. Vol. II, p. 428)

(11) And last, but not least, Cox testified that Business Agent Hanley had never been in his home. (R. Vol. II, p. 237) Mrs. Betty Cox testified that Hanley had been in her home on at least two separate occasions. (R. Vol. II, p. 395)

Again, it should be obvious that the testimony of the General Counsel's witnesses was a garbled mess, replete with inaccuracies, inconsistencies, improbabilities, contradictions, and even physical impossibilities. Their testimony is the best proof that the statements attributed to Musso are false.

Thomas Musso was an entirely credible witness despite the somewhat disjointed manner in which he testified as to incidents which involved him. There is an inner consistency to not only what he said, but to his demeanor. He stood as a man who was falsely accused and he made no bones about it. He became excited at the injustice which others sought to foist upon him and became incensed at the false accusations.

Musso testified that there was no conversation with Cox in the restaurant at any time, but that on a Tuesday in June, 1964, he was in the coffee shop when Belson, Kabush and Domino entered (R. Vol. II, p. 464) Again, it is to be noted that during this time there had been considerable publicity in the newspapers, on T. V. and radio concerning the formation of this Union. (R. Vol. II, pp. 235, 236, 450, 493) In any event, Musso was totally unaware of any organizational drive at the El Cortez and significantly there is no evidence to the contrary. (R. Vol. II, p. 464)

On this particular Tuesday, Kabush approached Musso and asked him if he (Musso) had been in Kabush's shoes would he join the Union. Musso replied: "You do whatever is best for you and whatever you do will be all right with me." (R. Vol. II, pp. 466, 467) Kabush corroborated Musso.

Musso also testified that subsequent to the time Joe Chiarra became a Boxman, which it should be noted resulted in Belson's return to a dealer status (R. Vol. II, p. 429), there was considerable antagonism towards Chiarra by the crew which included Belson, Cox, Franklin and Kabush. (R. Vol. II, pp. 102, 429, 460, 461) It is no secret that these men thought Chiarra to be incompetent. (R. Vol. II, p. 429) Cox, in particular, delighted in confusing the 68 year old Chiarra on payoffs of bets and even admitted that he "liked to raise Chiarra off his seat." (R. Vol. II, p. 231)

Chiarra often complained to Musso of the trouble at the table, but never said who it was that was causing the problem. (R. Vol. II, p. 461) As a result of these complaints, on several occasions Musso called the crew together and admonished them concerning their relations with Chiarra and the petty jealousies which Chiarra reported. (R. Vol. II, pp. 461, 467) Both Kabush and Cox verified the occurrence of these meetings. (R. Vol. II, pp. 229, 230, 231, 431)

In any event, Musso explained that as a result of Chiarra's complaints, he began to observe the crew and on approximately June 18th, when Cox was on a break, he walked to the table and said: "I bet a dollar to a penny that Cox is the instigator of the trouble on this table," referring, of course, to the trouble with Joe Chiarra. (R. Vol. II. p. 467) The admitted silence of all the dealers at that point serves to substantiate that Musso pointed the finger at trouble-maker Cox, for in fact, all of the dealers knew of his admitted guilt.

After considering the testimony of the General Counsel's witnesses, as opposed to the credible testimony of Musso and the corroboration given it by Kabush who is the only disinterested witness in the entire case, we are forced to the apparent and inescapable conclusion that the "case against Musso" is nothing more than a fabrication and a crude one at that. The Petitioner rebutted all that could be rebutted and the balance fell because of its inherent incredibility.

After reading the Trial Examiner's account of the incident, one gathers the impression that the testimony of the Board's witnesses were clear, cohesive and quite understandable. He leaves the impression that not only is there a preponderance of evidence substantiating his finding, but in fact, there is no question at all.

We suggest that an unbiased Trial Examiner could not have reached that result.

Respectfully submitted:

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Fredric N. Richman